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NO. 88-817

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

ROSA CARTER, ADMINISTRATRIX OF THE ESTATE
OF ADRIAN MILES CARTER, DECEASED,

Petitioner

v.

CITY OF CHATTANOOGA, TENNESSEE,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING OF THE PETITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent in this cause respectfully submits that no Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit sitting en banc which affirmed the judgment at trial for respondent although finding that the trial judge erred in

submitting the issues in this case to the jury on the basis of retroactive application of Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983).

OPINIONS BELOW

The opinion of the entire Court of Appeals for the Sixth Circuit sitting en banc filed June 27, 1988, is reported at 850 F.2d 1119 and is appended to the petition for Writ of Certiorari. The opinion the three-judge panel of the United States Court of Appeals for the Sixth Circuit filed October 6, 1986, is reported at 803 F.2d 217 and is appended to the petition for Writ of Certiorari. The opinion of the United States District Court for the Eastern District of Tennessee, Southern

Division, is unreported but is appended to the petition for Writ of Certiorari.

JURISDICTION

Respondent does not question the statutory jurisdiction as set forth in the petition, but does note that although the petition was timely filed, it was not docketed within the 90 day period set forth in 28 U.S.C. 2101(c).

QUESTIONS PRESENTED

I.

The en banc decision of the United States Court of Appeals for the Sixth Circuit, concerning the retroactive application of Tennessee v. Garner, is not in conflict with decisions of other federal courts of appeals cited by petitioner.

II.

The en banc decision of the United States Court of Appeals for the Sixth Circuit properly gave prospective application to the ruling of the United States Supreme Court in Tennessee v. Garner.

STATEMENT OF THE CASE

This action was brought by Rosa Carter, the mother and Administratrix of the Estate of Adrian Miles Carter, deceased, pursuant to 42 U.S.C. §1983, seeking damages for the alleged violation of the civil rights of her deceased son, Adrian Miles Carter. Said Adrian Miles Carter was shot and fatally wounded by Paul E. Kyle, a lieutenant in the Chattanooga Police Department, on December 21, 1982, when Adrian

Carter, along with another individual, attempted to escape from a burglary-in-progress at a residence in Chattanooga. This action was initially brought against both the City of Chattanooga and Lt. Kyle. In his Answer, Lt. Kyle pleaded a good faith immunity based on a good faith reliance upon the policies of the City, and the privilege afforded by Tennessee Code Annotated §40-7-108 to use all force necessary to capture the deceased after warning him to halt, if he had probable cause to believe the deceased was a felon and he had no other reasonable means available to apprehend him.

The Complaint asserted that the use of deadly force against the deceased was unconstitutional since he was committing a "non-violent" felony,

and that the City's policy allowed use of deadly force by officers without first exhausting other means of apprehending the party. The Complaint did not challenge the constitutionality of Tennessee Code Annotated §40-7-108 until it was amended in October, 1983, some five months after the verdict of the United States Court of Appeals for the Sixth Circuit in Garner v. Memphis Police Department, 710 F.2d 240 (6th Cir. 1983) (Garner II), aff'd. sub nom, Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985).

Following amendment of the Complaint by petitioner to include a Fourth Amendment claim, all parties moved for summary judgments on issues of liability, and in an Order dated January 27, 1984, the District Court

granted the Motion for Summary Judgment of defendant Kyle, but overruled the Motions for Summary Judgment of defendant City and petitioner and placed the matter on the docket for trial. As part of the Opinion accompanying the Order entered January 27, 1984, the District Court held that Garner II, decided seven months after the incident at bar had occurred, would be retroactively applied to the facts of this incident. Accordingly, the District Court ruled that the City's policy, based on the state law held unconstitutional in Garner II, was unconstitutional over the City's contention that Garner II should not be retroactively applied. The District Court further held that while the City's policy on the use of deadly force was unconsti-

tutional under Garner II, the record was not clear enough to grant plaintiff's Motion for Summary Judgment on all liability issues since it remained to be determined whether the actions of Lt. Kyle could satisfy the standards enunciated in Garner II.

The case proceeded to trial on January 30 and 31, 1984, before a six-person jury which was charged under the standards enunciated by the Sixth Circuit Court of Appeals in Garner II. After hearing all the evidence and being charged under Garner II instructions, the jury returned a verdict for defendant City of Chattanooga to which petitioner filed a Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial, which were overruled.

Petitioner appealed the judgment of the District Court to the Sixth Circuit Court of Appeals at which time defendant City of Chattanooga filed its Cross-Appeal alleging that Garner II should not have been retroactively applied to the facts of this case. On March 27, 1985, this Court issued its ruling in Tennessee v. Garner, supra, which did not specify whether it was to be retroactively applied. Following the ruling of this Court in Tennessee v. Garner, supra, a three-judge panel in the United States Court of Appeals for the Sixth Circuit applied the Garner decision retroactively to the facts of this case in its decision reported at 803 F.2d 217 (6th Cir. 1987).

A Petition for Rehearing and Suggestion of Rehearing En Banc was

granted by the United States Court of Appeals for the Sixth Circuit and the decision of the three-judge panel was vacated. Following oral argument, the United States Court of Appeals for the Sixth Circuit, sitting en banc, issued its Opinion on June 27, 1988, reported at 850 F.2d 1119, and affirmed the judgment of the United States District Court for respondent, City of Chattanooga, although finding that the District Judge was in error in submitting issues in this case to the jury on the basis of retroactive application of Garner II. Thereafter, plaintiff's counsel filed a Petition for Certiorari with this Court on September 24, 1988, the initial copies of which were received by Respondent counsel on September 27, 1988.

STATEMENT OF FACTS

For the purposes of this response, respondent adopts the facts set forth in the Background portion of the opinion of the Court of Appeals found at 850 F.2d 1120-1122.

ARGUMENT

I.

THE EN BANC DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CONCERNING THE RETROACTIVE APPLICATION OF TENNESSEE V. GARNER, IS NOT IN CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS CITED BY PETITIONER.

In essence, the en banc Court of Appeals simply applied the standards set forth by this Court in Chevron v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30

L.Ed.2d 296 (1971) and determined that its Garner decision, supra, should not be applied retroactively. The Court below plowed no new ground.

The en banc decision of the United States Court of Appeals for the Sixth Circuit reported at 850 F.2d 1119 does not conflict with decisions of other federal courts of appeals which have discussed retroactive application analysis set forth by this Court in Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The United States Court of Appeals for the Sixth Circuit, sitting en banc, correctly applied the law regarding retroactive application of the Garner II decision to the facts of this case.

At the time petitioner's deceased was shot, on December 21, 1982, the

clear past precedent in the Sixth Circuit on which all of the litigants specifically had relied for five years was the case of Wiley v. Memphis Police Department, 548 F.2d 1247 (6th Cir. 1977), cert. den. 434 U.S. 822, 98 S.Ct. 65, 54 L.Ed.2d 78 (1977).[1] The Wiley Court specifically found the Tennessee fleeing felon statute to be constitutional against all stated grounds after jurisdiction of the Court was invoked for civil rights causes of action "under the Fourth, Fifth, Sixth, Eighth, Thirteenth and Fourteenth Amendments to the Constitution" Wiley,

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[1] The City admittedly relied on the State's fleeing felon statute and petitioner was not allowed to amend her Complaint to add a Fourth Amendment count until approximately five months after Garner II was decided.

supra at 1248. The Wiley Court in its decision went to great pains to criticize Mattis v. Schnarr, 547 F.2d 1007 (8th Cir. 1976), the only appellate case of its time finding "fleeing felon" statutes unconstitutional. Wiley, supra, at 1253-54. Prior to Wiley, multiple decisions of Courts within the Sixth Circuit and Tennessee specifically upheld the Tennessee fleeing felon statute from constitutional challenges on all asserted grounds. See, Cunningham v. Ellington, 323 F. Supp. 1072 (W.D. Tenn. 1971); Beech v. Melancon, 465 F.2d 425 (6th Cir. 1972), cert. den., 409 U.S. 1114, 93 S.Ct. 927, 34 L.Ed.2d 696 (1973); Smith v. Jones, 379 F.Supp. 201 (M.D. Tenn. 1973), aff'd, 497 F.2d 924 (6th Cir. 1974), and Qualls v. Parrish, 534 F.2d

690 (6th Cir. 1976); Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921).

At the time of the shooting in the case at bar, Garner v. Memphis Police Department, 600 F.2d 52 (1979) (hereinafter called Garner I) had been remanded to the District Court to determine whether a municipality had a qualified good faith immunity under Monell, and if not, whether "...a municipality's use of deadly force under Tennessee law to capture allegedly non-dangerous felons fleeing from non-violent crimes [is] constitutionally permissible under the Fourth, Sixth, Eighth and Fourteenth Amendments?" (600 F.2d 54-55). The Garner I decision made no specific finding of unconstitutionality of the Tennessee fleeing felon statute, nor gave any advance indication that the

Sixth Circuit would be disposed to overturn the clear precedent which was the law of the Circuit. This is further evident in that the Garner I District Court after remand, on July 8, 1981, a year and a half before the incident at bar, confirmed the presumed status of precedent in the Sixth Circuit when it dismissed the case holding that the Tennessee fleeing felon statute was a matter of policy for the legislature rather than the judiciary, and that the statute was neither unconstitutional on its face, nor as applied.

The clear precedent of the Sixth Circuit was also evident in Truss v. Collier, 574 F.Supp. 1249 (S.D. Ohio 1983). The Truss decision, which was decided almost four months after the shooting which gave rise to the case at

bar, clearly shows that as late as April 8, 1983, courts within the Sixth Circuit believed that fleeing felon statutes were constitutional upon all grounds asserted by petitioner in this cause. Truss, supra at 1260. At the time of the shooting in the case at bar, the Garner II decision of the Sixth Circuit Court of Appeals interpreting the Tennessee fleeing felon rule to be unconstitutional under the Fourth Amendment to the Constitution was not to be released for another six (6) months; and the final resolution regarding constitutionality was not to be resolved by this Court in Tennessee v. Garner, supra, until more than two years later.

The argument that the decision of the en banc panel of the Sixth Circuit

Court of Appeals is contrary to retroactive application in other circuits was clearly addressed by the majority of the Court of Appeals sitting en banc. Due to the concern of Judge Merritt in his dissent, the majority of the en banc panel specifically reviewed all seven decisions from other circuits that allegedly "have applied Garner retroactively." 850 F.2d at 1135-6. The majority succinctly found that not one of the decisions cited by petitioner expressly analyzes whether Garner should have retroactive effect. 850 F.2d at 1135. The majority clearly noted that not one of the decisions cited by petitioner even referred to Chevron Oil Company v. Huson, supra, "nor do they make any retroactivity analysis about the effect of Garner on

the use of deadly force by police as authorized by the common law and/or by a law such as that of Tennessee...." One exception to the cases cited by petitioner noted by the majority of the Sixth Circuit sitting en banc is the decision from the Eleventh Circuit which is clearly distinguishable due to the applicable law within that Circuit at the time.

After succinctly reviewing all seven cases cited by petitioner, the majority of the Sixth Circuit Court of Appeals sitting en banc stated as follows:

> We have not previously cited or relied upon these cases cited by Judge Merritt in his dissent because they do not discuss or consider the issues which are here involved concerning municipal liability under §1983 or whether, under Chevron principles, the

> Supreme Court's Garner decision should be retrospectively applied. We do not believe they are authority which deals with the kind of Chevron analysis which Judge Merritt himself seems to concede is warranted in this case. 850 F.2d at 1136-7.

Respondent respectfully submits, as set forth in the majority en banc decision of the Sixth Circuit Court of Appeals that retroactive application of the Garner II decision was properly denied following careful scrutiny of all criteria enunciated in Chevron. Respondent respectfully submit that the en banc decision in this case does not conflict with any decision cited by petitioner with the sole possible exception of Pruitt v. City of Montgomery, 771 F.2d 1475 (11th Cir. 1985) which was based upon the earlier decision of Acoff v. Abston, 762 F.2d 1543 (11th

Cir. 1985). The Pruitt decision by the Eleventh Circuit is not in conflict with the ruling of the Sixth Circuit, but rather supports a proper Chevron analysis regarding whether a decision overruled clear past precedent upon which litigants may have relied even though the Eleventh Circuit did not cite Chevron. In Pruitt, supra and Acoff, supra, the Eleventh Circuit properly retroactively applied the Garner decision because Ayler v. Hopper, 532 F.Supp. 198 (M.D.Ala. 1981), had previously ruled the Alabama fleeing felon statute to be unconstitutional although not specifying the constitutional ground violated. As such even though no Chevron analysis occurred there could not be any argument within the Eleventh Circuit, at least in cases

stemming from the State of Alabama, that there was no prior precedent or foreshadowing as to the constitutionality of the statute which would satisfy the first criterion of Chevron.

Since the time that the en banc decision in the case at bar occurred on June 27, 1988, respondent is aware of two additional decisions which have emerged in other circuits concerning retroactive application of Tennessee v. Garner. The Second Circuit in Davis v. Little, 851 F.2d 605, (2d Cir. 1988) in an opinion decided July 12, 1988, affirmed the retroactive application of Garner to an individual police officer who had waived the defense of good faith immunity. Although the Second Circuit failed to give any mention to the en banc decision of the Sixth

Circuit in Carter v. City of Chattanooga, the Second Circuit found that a careful reading of prior precedent within that Circuit, specifically Jones v. Marshall, 528 F.2d 132 (2d Cir. 1975) was "essentially consistent with, rather than contrary to, Tennessee v. Garner." 851 F.2d at 610. Thus, as in the Eleventh Circuit, the Second Circuit may have properly given retroactive effect to Garner because that Circuit believed it had "foreshadowed" Garner in its previous decisions.

Most recently, however, the Tenth Circuit Court of Appeals has followed the Sixth Circuit by prospectively applying the Garner decision in a case involving a municipality and its policies. Mitchell v. City of Sapulpa, 857 F.2d 713 (10th Cir. 1988). In this

decision by the Tenth Circuit Court of Appeals filed on September 20, 1988, the retroactive application of the Garner decision was succinctly rejected after analysis by that Court applying Chevron criteria.[2] After expressly reviewing all applicable law dealing with Garner application to prior police shootings, the Tenth Circuit concluded that only three circuits have directly addressed the retroactivity issue. Acoff v. Abston, supra; Davis v. Little, supra; and Carter v. City of Chattanooga.

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[2] It should be noted that the Tenth Circuit did not consider Ryder v. City of Topeka, 814 F.2d 1412 (10th Cir. 1987), cited by Petitioner as one of the cases to be in alleged conflict with this case, to be binding authority on the issues of whether Garner should be applied retroactively because the parties in Ryder did not ever raise the retroactivity issue before the Court.

The Tenth Circuit in Mitchell relied heavily upon the en banc opinion in this case and found that Tennessee v. Garner, decided "an issue of first impression whose resolution was not clearly foreshadowed." 857 F.2d at _____. After applying the three-pronged Chevron analysis, the Tenth Circuit found that its precedent did not foreshadow the Garner decision that the common law rule, if applied to permit deadly force, was unconstitutional. The Tenth Circuit agreed that the decision of this Court in Tennessee v. Garner decided a novel question of law, which although it may not have been a clear break with past precedent, certainly represented a decision on "an issue of first impression whose resolution was not clearly foreshadowed...."

After a careful review of all Chevron factors, the Tenth Circuit concluded that Garner should not be applied retroactively to impose liability on the defendants municipality.

Respondent would respectfully submit that the Sixth Circuit sitting en banc properly applied all Chevron factors to the facts of this case. It is respectfully submitted that this case does not conflict with the rulings of other circuits which have analyzed retroactivity under Chevron factors and that there is no need for this Court to resolve any conflict.

II.

THE EN BANC DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT PROPERLY GAVE PROSPECTIVE APPLICATION TO THE RULING OF THE UNITED STATES SUPREME COURT IN TENNESSEE V. GARNER.

Petitioner asserts that the retroactive effect of its decision in Garner is inconsistent with the ruling of the Sixth Circuit majority opinion in the case at bar. Respondent would respectfully submit, however, that the opinion of this Court in Tennessee v. Garner, did not in any way discuss retroactive application to other decisions pending in litigation. Specifically, this Court noted that the complaint in Garner had been dismissed as to all individual defendants, that the State was

not subject to liability, and that the only possible liability of the remaining defendants, the police department and the City of Memphis, hinged on Monell v. New York City Department of Social Services, 436 U.S. 658, 56 L.Ed. 2d 611, 98 S.Ct. 2018 (1978). 471 U.S. at 22, 85 L.Ed.2d at 16.

This Court had held that the Constitution is silent on whether lower courts should apply new decisions prospectively only or may apply them retrospectively or retroactively to other cases arising before the announcement of the new rule. Great Northern Railroad v. Sunburst Refining Company, 287 U.S. 358, 77 L.Ed.2d 360 (1932); Tehan v. U.S. Exrail Shott, 382 U.S. 406, 15 L.Ed.2d 453 (1966). This Court has specifically considered retroactive

application of new rules of law in purely civil cases in Chevron Oil Company v. Huson, supra. and has further affirmed the standards set forth in Chevron, as controlling in all civil cases in the criminal case of United States v. Johnson, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202, 222-223 (1982). Respondent would respectfully submit that the Sixth Circuit Court of Appeals, sitting en banc, properly applied the three-part analysis contained in Chevron to the facts of the case at bar in its decision not to retroactively apply the Garner decision to this case. Such is a proper application of the standards enunciated by this Court in Chevron.

Respondent respectfully submits that the ruling of the Sixth Circuit

Court of Appeals sitting en banc does not conflict with the ruling of this Court in Garner and that the prospective application of Garner adopted by the en banc panel of the Court of Appeals was clearly consistent with the holding of this Court in Chevron.

CONCLUSION

Based upon the foregoing arguments, respondent respectfully submits that no Writ of Certiorari should issue from this Court to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit sitting en banc which affirmed the judgment and opinion of the United States District Court for respondent although finding that the trial judge erred in submitting the issues in this case to

the jury on the basis of retroactive application of the Garner decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Randall L. Nelson, a member of the bar of this Court, hereby certify that on this 23 day of November, 1988, three copies of the brief for Respondent in Opposition to the Granting of

the Petition in the above entitled case were mailed, first class postage prepaid to John W. McClarty, 18 Patton Parkway, Chattanooga, Tennessee 37402, and Rheubin M. Taylor, 615 Lindsay Street, Chattanooga, Tennessee 37402.

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